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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANTHONY ANTONE,

Petitioner,

vs. Case #83-5644

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINION BELOW

The following reported opinions are relative to the petition for writ of certiorari.

Antone v. State, 382 So. 2d 1205 (Fla. 1980) (opinion on direct appeal to the Supreme Court of Florida)

Antone v. State, 355 So. 2d 777 (Fla. 1977) (remand by Florida Supreme Court for United States v. Agurs, 427 U.S. 97 (1976) hearing).

Antone v. State, 410 So. 2d 157 (Fla. 1982) (opinion of Florida Supreme Court in post conviction appeal)

Antone v. Strickland, 706 F. 2d 1534 (11th Cir. 1983)

JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's statement of the case.

STATEMENT OF THE CASE

A. Course of prior proceedings.

Respondent accepts petitioner's statement with respect to course of prior proceedings.

B. Facts Relevant to the question presented.

Respondent accepts the "Facts Relevant to the Questions Presented" as they appear in the Petition with the following additions, exceptions or reservations.

1. The Statements appearing in the last three paragraphs of page 11 of the Petition relevant to what the prosecutor and petitioner's counsel did or did not argue as these paragraphs contain argumentative matter.

2. The statement appearing in page 12 of the Petition wherein Petitioner argues he was denied a continuance of the state evidentiary hearing. It is correct that he was denied a continuance, but the state trial judge had forewarned counsel three days earlier at a pre-evidentiary hearing that the hearing would be conducted. Moreover, the witness to which Petitioner refers to were attorneys which Petitioner wanted to call as experts on ineffectiveness. Both the state trial judge and District Court agreed that experts were not necessary because the judge was an attorney and could understand the evidence (A-123-124).

REASONS FOR DENYING CERTIORARI

None of the questions which Petitioner raises merits review by the Court. The questions which Petitioner seeks

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answered either have been answered, involve factual matters, or factually such that Petitioner has no standing to raise. To elaborate:

QUESTION ONE

> Whether the Principles of Payton v. New York, should be applied retroactively to a case raising the issue for the first time on callateral review or whether the federal courts are barred under Stone v. Powell from considering the Payton v. New York issue.

The Court answered the question in United States v. Johnson, _____U.S._____73 L. Ed 2d 202 (1982). Therein the Court held that Payton v. New York, 445 U.S . 573 is to be given retroactive application to convictions that were pending on direct appeal at the time the decision was rendered. Payton was decided on April 15, 1980. The first time Payton was raised by Petitioner was when he filed his motion for post conviction relief in state court on January of 1982. Stone v. Powell, 428 U.S. 465 (1976) prohibits consideration of Fourth Amendment claims by way of federal habeas unless the state has failed to provide the opportunity for a full and fair litigation of his claim. Petitioner argues that he was not given a full and fair opportunity to be heard in state court because Florida law at the t'me was controlled by State v. Perez, 277 So. 2d 778 (Fla. 1973) which allowed warrantless arrests in the home.

Petitioner miscomprehends the meaning of a fair opportunity to be heard. Florida Rule of Criminal Procedure 3.190(b) and (i) provided him with the opportunity to litigate this issue. He could have raised the issue then, regardless the existing law, and set the predicate for certiorari review in this Court as did the Petitioner in Payton. In Payton the New York Courts had denied Payton's claim on the grounds that the law was well established. Nevertheless, by raising the issue in the Courts of New York he ultimately succeeded in this Court.

Moreover, as this court's decision in Payton reflects the "tools" for raising this issue were available, Engle v. Isaac, 456 U.S. 107 (1982) because many jurisdictions had already held warrantless arrests in the home unconstitutional, Payton, 445 U.S. at 575.

Since this question and any corollary issue it may raise has been answered by this Court, this question does not merit certiorari.

QUESTION II

> Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his capital trial by counsel's failure to present evidence in mitigation, by counsel's failure to present other mitigating circumstances outside the statutorily prescribed factors, by counsel's failure to adequately or effectively present argument during the penalty phase or by counsel's failure to request special jury instructions to clear up deficiencies in the standard jury instructions?

One need only read the question which Petitioner propounds to see that he is not asking the Court to answer a significant constitutional question. He is asking the Court to review the evidence and substitute it's judgment for that of the Florida Courts, the District Court and the Circuit Court of Appeal. This Court has said it does not take cases simply to grant a second appeal or to review evidence and discuss specific facts. United States v. Johnston, 268 U.S.220 (1925), Graves Manufacturing Company v. Linde Co., 336 U.S. 271 (1949).

As Petitioner recognizes in his petition, (Petition p.12) there was an evidentiary hearing held in state court on the issue of ineffectiveness of counsel. See also Antone v. Strickland, 706 F. 2d 1534 (Fla.1983). At that evidentiary hearing petitioner was afforded full opportunity to present any evidence in support of his ineffectiveness claim. Nevertheless, as petitioner

again recognizes, petitioner's counsel refused to let his trial counsel testify at the evidentiary hearing. (Petition P. 12) Notwithstanding, some testimony was presented (A-128 footnote 7) and the state trial court made specific findings with respect to the ineffectiveness of counsel claims. These findings were reviewed and approved by the Florida Supreme Court. Antone v. State, 410 So. 2d 157, 160-161 (1982). The The District Court, after first refusing to conduct a further evidentiary hearing in view of the fact that Petitioner had refused to carry his burden (A-128) applied the precepts of Sumner v. Mata, 449 U.S. 539 (1981) and 28 U.S.C. §2254(d). In reviewing the District Court's decision the Eleventh Circuit concurred. Antone v. Strickland, 706 F. 2d 1534, 1540 (1983).

If, then, there is any question that Petitioner should seek answered but, significantly, does not, it should be one surrounding the misapplication of 28 U.S.C. 2254(d). He did not raise such a question below and does not raise one here.

Were this Honorable Court to grant certiorari on the question which Petitioner propounds it would be ignoring its own precepts because it would be deciding a factual issue that, presumptively, has been correctly decided by the Florida Courts.

QUESTION III

Whether in the application of the especially heinous, atrocious and cruel aggravating factor to petitioner's case, the State of Florida had used such a vague and overbroad construction of the factor that the Eighth and Fourteenth Amendments are violated?

This issue is the least meritorious of all. While the state trial court in imposing sentence did find the crime to have been committed in a heinous, atrocious or cruel manner the Florida Supreme Court in reviewing the sentence questioned the propriety of that finding; nevertheless, determined the sentence to be appropriate even absent that statutory aggravating factor. Antone v. State, 382 So. 2d 1205, 1216 (Fla. 1980). The Eleventh Circuit recognized that the Florida Supreme Court had not held this aggravating circumstance to have been appropriately found. Antone v. Strickland, 706 F. 2d 1534, 1538-1539 (11th Cir. 1983).

Consequently, assuming arguendo, that the Florida Supreme Court, in some other case, may have given an overly broad construction to that factor, it did not do so in Petitioner's case. Thus Petitioner has no "standing" to contest the constitutionality of Florida's death statute as applied. United States v. Raines, 362 U.S. 17 (1960), County Court of Ulster County, New York, v. Allen, 442 U.S. 140 (1979).

QUESTION IV

> Whether the failure of the State to comply with the requirements of Brady v. Maryland, and United States v. Agurs. by failing to disclose the existence of a relevant witness thereby precluding petitioner from having a witness to testify in the penalty phase of his capital trial as to the circumstances of the offense denied petitioner his Eighth and Fourteenth Amendment rights?

Once again Petitioner mistates his question. His question surrounds the alleged failure of the state to apply Brady v. Maryland, 373 U.S. 83 (1973) and United States v. Agurs, 427 U.S. 97 (1979). Yet in the body of his argument he says the Eleventh Circuit misapplied Title 28 U.S.C. 2254 (d) and

Sumner v. Mata, 449 U.S. 539 (1981). It is unclear which question Petitioner wants answered. Does it revolve around the failure to comply with Brady and Agurs or is it concerned with a misapplication of Sumner and 2254(d)?

A full blown evidentiary hearing was held in the state trial court. The judges detailed findings were set out in the Florida Supreme Court's opinion on review. Antone v State, 410 So. 2d 157, 159-160 (1982). The lower courts applied 2254(d).

Petitioner suggests that Judge Kravitch's concurring analysis is the correct one. But, assuming it is, Petitioner fails to understand that Judge Kravitch, perhaps without realizing, also applied 2254(d) because her ultimate conclusion that the "Brady" violation was non-prejudicial, was a finding also made by the state trial judge:

> ". . . even if there had been, which there was not, a specific request for this evidence there is no reasonable likelihood that it would have affected the outcome of the trial or sentence."
>
> Antone v. State, 410 So. 2d 157, 160 (Fla. 1982).

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondents, and a member of the Bar of the United States Supreme Court, hereby certify that on this 29th day of October, 1983, I served one copy of the Brief of Respondent In Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on Mr. Tom McCoun, Esquire, Louderback, McCoun and Helinger, 1 Plaza Place NE, Suite 1009, St. Petersburg, Florida 33701 by a duly addressed envelope with postage prepaid.

OF COUNSEL FOR RESPONDENTS